STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Level 3 Communications, L.L.C.	)	
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	)	**04 - 0428**
Petition for Arbitration Pursuant to Section 252(b) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996, and the Applicable State Laws For Rates, Terms, and Conditions of Interconnection with Illinois Bell Telephone Company (SBC Illinois)	)	

REPLIES TO BRIEFS ON EXCEPTIONS OF THE STAFF OF THE ILLINOIS COMMERCE COMMISSION

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Now comes the Staff of the Illinois Commerce Commission ("Staff"), by its undersigned attorneys, and pursuant to Section 761.430 of the Commission's Rules of Practice (83 Ill. Adm. Code 761.430) respectfully submits this Replies To Briefs on Exceptions to the Administrative Law Judges' ("ALJ") Proposed Arbitration Decision ("PAD") issued on December 23, 2004.

I. Replies to SBC's Exceptions

A. SBC Exception 2 - GT&C Issue 7:

The Commission should disregard SBC's exception to the PAD's finding regarding GT&C Issue 7, because there is no record evidence to support the company's position. The crux of SBC's exception regarding the PAD's resolution of GT&C Issue 7 *assumes* that Level 3 will be unable to pay its bills regardless of

how much it desires to pay them. SBC BOE at 5-6. As there is no evidence in the record to support such an assumption, Staff finds the assumption to be mere speculation. In fact, even SBC's exception is not specific to Level 3. SBC's exception references an unidentified CLEC that is "likely" to (or in all "likelihood" will) be unable to pay its bills in the future. There is absolutely no evidence in the record to support the conclusion implicit in SBC's exception that at some undefined time in the future Level 3 *will* not be able to pay its bills. Indeed, there is no evidence of record regarding Level 3's payment or credit history with SBC, or with any other supplier or creditor.

Further, circumstances in which SBC can disconnect *all* services to Level 3, and subsequently disconnect *any or all* of Level 3's end-user customers, regardless of whether the amount Level 3 owed to SBC is related to a specific end-user, would clearly undermine the public interest. End-user consumer services should not be disconnected at the speculative whim of SBC because some unidentified CLECs have experienced trouble paying their debts to SBC. The public has an interest in knowing that they, the end-user customers that have faithfully paid their phone bills, will not have their service interrupted because SBC is dissatisfied with Level 3's payments, particularly in circumstances that have nothing to do with the service that a specific end-user customer may be purchasing from Level 3. Staff, moreover, reminds the parties to this arbitration and emphasizes that the disconnection of any telecommunications services provided by a telecommunications carrier must adhere to the requirements of

Section 13-406 of the PUA and the requirements of Part 731 of the Commission's rules. *See* 220 ILCS 5/13-406 and 83 Ill. Admin. Code § 731.

Moreover, the mechanisms that the PAD provides SBC to protect its interests are commercially reasonable and will clearly serve to minimize SBC's exposure to unpaid bills. PAD at 19-20. Accordingly, for the reasons noted, SBC's argument and proposed replacement language that would allow it to disconnect all services it provides to Level 3 because of nonpayment of a bill for certain specific services should be rejected.

B. SBC Exception 3 - GT&C Issue 9

SBC takes exception to the PAD on this issue because it is resolved in the same manners as GTC Issue 7, which directs that SBC "may only disconnect or discontinue unpaid, undisputed service(s), not all other services furnished to Level 3." PAD at 23. SBC reiterates its position articulated in GT&C Issue 7 that it should be allowed to disconnect or discontinue all services(s) to Level 3 if Level 3 fails to timely pay for any specific service. SBC BOE at 7; *see also* SBC BOE at 4-6. As noted above, Staff maintains that (1) there is no record evidence to support SBC's position, (2) the public interest would be compromised if the Commission were to adopt SBC's position, and (3) the PAD provides SBC commercially reasonable mechanisms to protect its interests, which will serve to minimize SBC's exposure to unpaid bills. Consequently, Staff recommends that SBC's proposed replacement language be rejected.

C. SBC Exception 15 - IC Issue 1

SBC argues that the PAD errs in declining to determine whether certain FCC regulations apply to the provision of IP-enabled services. SBC BOE at 19. It asserts that the Commission has a duty to resolve this issue, and must resolve it in favor of SBC, because the FCC has yet to specifically address the issue, and the traffic in question "is subject to access charges, unless and until the FCC rules otherwise." SBC IB at 20.

This assertion significantly misstates the applicable FCC Orders. In its *Vonage Order*, the FCC stated that:

> [W]e add to the regulatory certainty we began building with other orders adopted this year regarding VoIP - the Pulver Declaratory Ruling and the AT&T Declaratory Ruling - by making clear that **this Commission, not the state commissions, has the responsibility and obligation to decide whether certain regulations apply to DigitalVoice and other IP-enabled services having the same capabilities.**
>
> Vonage Order, ¶1 (emphasis added)

Thus, the FCC has unequivocally declared that it, not state Commissions, is responsible for determining the application of FCC regulations to IP-enabled services. It is difficult to see how this can be reconciled with SBC's contention that this Commission is responsible for doing so, at least in the context of this arbitration.

Accordingly, SBC's argument that it is irrelevant that the FCC has not formulated specific directives regarding IP-enabled services is erroneous. SBC BOE at 20. The Commission cannot incorporate into this ICA FCC regulations regarding the IP-enabled services at issue, because the FCC has not clarified

how its regulations apply, but has nonetheless stated the questions of such application fall within its purview, rather than that of state Commissions. This being the case, the Commission would be compelled to violate the FCC's directive to do what SBC suggests it must.

Furthermore, the primary issue that SBC requests the Commission resolve is what, if any, intercarrier compensation regime should apply to the IP-enabled services at issue in this proceeding. SBC BOE at 22. However, this is precisely the question the FCC addressed in the *AT&T Declaratory Ruling*[1] – the decision the FCC cites as support for its declaration that it, and not state Commissions will address the application of existing regulations to IP-enabled services. Therefore, there is no question that the FCC includes the issues raised here among those it intends for it, and not this Commission, to resolve.

Finally, SBC argues that it is not impractical for the Commission to decide these issues if the carriers do not and will not exchange IP-enabled traffic prior to an FCC ruling on these issues, because any FCC determination on these issues, under such circumstances, cannot cause the carriers to disrupt their operations as a result of a regulatory reversal. SBC BOE at 21. That is, SBC's argument assumes the Commission's determination will have no bearing on the parties actual operations. Under such circumstances, however, SBC's demand that the Commission resolve these issues – a demand that challenges the Commission's authority to do otherwise -- rings hollow. SBC BOE at 19, 22. That is, if the carriers do not now exchange IP-enabled traffic, and will not exchange it prior to

[1] SBC refers to this as the "Access Avoidance Order." *See, e.g.,* SBC IB at 26; SBC RB at 29; SBC RBOE at 21.

an FCC ruling on these issues, SBC is essentially demanding the Commission rule on an issue upon which the FCC has determined state Commissions should not rule, and moreover do so for no practical reason. SBC's argument should be rejected.

The primary -- if not the sole -- function of the FCC's *Vonage Order* is to establish the FCC's authority to determine how its regulations, including intercarrier compensation regulations, apply to IP-enabled services, such as those at issue in this proceeding. SBC essentially asks the Commission to simply disregard the FCC's *Vonage Order* and, instead, to impose its own interpretation of the application of existing regulations to IP-enabled services. SBC's position should be rejected.

II. Replies to Level 3's Exceptions

A. Level 3 Exception 1 – Issues ITR 1, 18(c), 19; IC 2(a), (c-j), 4

In its proposed finding regarding Issue IC – 2, the PAD states:

> [W]e concur with Staff that the ICA must expressly and unequivocally state that IP-enabled services are excluded from the ICA and that none of the ICA's rates, terms, and conditions apply directly or indirectly to such services. When the FCC issues relevant decisions, such exclusionary provisions in the ICA may need to be revised, pursuant to the ICA's change-of-law provisions, in order to comply with the FCC.
>
> PAD at 121.

Staff believes this directive to be clear and unambiguous. Nevertheless, Level 3 purports to a degree of confusion regarding this directive.

First, Level 3 asserts, in its "Introduction and Summary" that: "[t]he PAD correctly determined that IP-Enabled Traffic should not be subject to access charges[.]" Level 3 IB at 4. Level 3 offers no citation to any proposed finding in the PAD that would support its assertion, as indeed it cannot, because the PAD reaches no such finding. The PAD reaches no determination regarding whether or not IP-Enabled Traffic should be subject to access charges. The PAD clearly and properly yields, without prejudice, any determination as to whether or not access charges apply to Level 3's IP-Enabled services traffic to the FCC.

Second, Level 3 states: "the Commission must make clear that a finding that IP-enabled services are excluded from the ICA results in the Parties not imposing any form of compensation – access, reciprocal compensation or bill and keep – for IP-TDM Traffic unless and until the FCC addresses the issue in its open proceeding." Level 3 BOE at 7. The PAD very clearly states that "the ICA must expressly and unequivocally state that IP-enabled traffic services are excluded from the ICA and that none of the ICA's rates, terms, and conditions apply directly or indirectly to such services." PAD at 121. Thus, Level 3's concern that the PAD does not clearly establish that the ICA is not to impose any form of compensation for IP-TDM Traffic is unwarranted.

Furthermore, the PAD states "[w]hen the FCC issues relevant decisions, such exclusionary provisions in the ICA may need to be revised, pursuant to the ICA's change-of-law provisions, in order to comply with the FCC." PAD at 121. This directive is again clear. What is far from clear is how Level 3 reads into this determination an affirmative finding that intercarrier compensation rates, terms,

or conditions for IP-TDM Traffic cannot be added to the ICA until the FCC addresses the issue in some particular unspecified open proceeding. As the PAD makes clear, the ICA may need to be revised pursuant to any "relevant" FCC decision. In fact, in its *Initial Brief* in this proceeding, Level 3 cites to four FCC proceedings that might decide this issue. Level 3 IB at 84. Clearly, there are multiple proceedings that could result in a "relevant decision" that would create a need for the parties to add intercarrier compensation rates, terms, or conditions for IP-TDM Traffic to their ICA. In fact, nothing precludes the parties from filing further petitions with the FCC to open new proceedings to resolve the specific issues they have presented to this Commission in this proceeding.

Similarly, Level 3 is wrong when it contends that the Commission must clarify that "it is not adopting any term or condition in the agreement that could be construed by SBC to mean that the Illinois Commerce Commission has approved of SBC's practice of requiring Level 3 to establish Feature Group D access trunks to exchange IP enabled traffic." Level 3 BOE at 7. Again, Level 3 offers no citation to any language that would support its position that the PAD could be read to approve any SBC practice of requiring Level 3 to establish Feature Group D access trunks to exchange IP enabled traffic, and, again, it cannot, because the PAD makes no such finding. The PAD in fact makes no determination regarding whether or not such arrangements are required. The PAD clearly and properly yields, without prejudice, any determination as to whether or not Level 3 must establish Feature Group D access trunks to exchange IP enabled traffic to the FCC.

B. Level 3 Exception 2 – Issues ITR 11, 12, 18(c); IC 4

With respect to Issues ITR 11, 12 ,18(c), and IC 14(c), the PAD finds as follows:

> The parties have refined their sub-issues to the single question of whether their ICA should authorize mixed traffic over combined trunks (Level 3) or segregated traffic over limited-purpose trunks (SBC). Level 3 Init. Br. at 47. As Staff aptly notes, that question pits Level 3's asserted benefits of combined trunking (reduced facilities expense and clutter) against SBC's asserted costs (measurement and audit expense, under-recovery of revenue). Staff Init. Br. at 37. Staff is also correct that there is scant quantitative evidence of those asserted costs and benefits.
>
> Nonetheless, SBC does show that Level 3 already has local and meet point trunks in place, thus limiting Level 3's burden to the expense of additional trunking for non-meet point InterLATA traffic. Additionally, there is no disagreement that direct measurement will produce more accurate intercarrier compensation than will the allocation factors proposed by Level 3 [fn]. Consequently, the Commission finds insufficient basis for altering the course we have charted in previous (and recent) arbitrations, in which combined trunking has not been approved [fn].
>
> We disagree with Level 3's contention that the Federal Act establishes a CLEC right to combined trunking. Level 3 is correct that the Local Competition Order assures that carriers of, *inter alia*, interexchange traffic are entitled to interconnection under subsection 251(c)(2), so long as such interconnection is not "solely for the purpose of originating or terminating…interexchange traffic." [fn] However, that right to interconnect facilities and equipment does not, on its face, create a right to a particular trunking arrangement. That more particular right must come from some statutory provision or from an FCC decision or rule.
>
> Level 3 contends that such a right is implied by the subsection 251(c)(2)(B) ILEC duty to accommodate CLEC interconnection "at any technically feasible point within the [ILEC's] network." While that provision empowers a CLEC to determine *where* interconnection will occur (and to insist upon a single point of interconnection), it does not - either by its terms or pursuant to FCC interpretation - confer a right to a specific trunking arrangement.

Level 3 also cites the anti-discrimination provisions of subsections 251(c)(2)(C) and (D). The Commission concurs that inferior treatment would violate a CLEC's right to parity. However, Level 3 has not proven that disparity exists. Instead, SBC demonstrates that the pertinent trunking arrangements it proposes here are no different than the arrangements it has with its own affiliates. SBC Reply Br. at 84, fn. 26. SBC's traffic mix within its local network transport is irrelevant to Level 3's discrimination case, which is about trunk routing between carriers.

Additionally, Level 3 avers that the FCC, through its Wireline Competition Bureau, rejected segregated trunking on grounds of inefficiency and disproportionality in the Virginia Arbitration Order. We find that claim misleading. The ILEC there had requested separate trunking for busy line verification and emergency interrupt calls, not for the far greater traffic volume associated with local and interexchange services in general. Furthermore, the Bureau expressly stated that it was not interpreting or declaring rights and duties under Section 251 of the Federal Act, but determining the "more reasonable" approach to trunking, based on the facts presented there [fn].

Finally, Level 3 contends that IP-enabled traffic is information services traffic, analogous to ISP-bound traffic. Per FCC rulings (and depending upon carrier choices under those rulings), ISP-bound traffic is subject to the same compensation regime as local traffic, thereby relieving ILEC concerns about traffic rating. However, given our conclusion elsewhere in this Arbitration Decision that we cannot and will not make rulings regarding IP-enabled services, the Commission will not attempt to decide whether IP-enabled traffic is information services traffic [fn], whether it is analogous to ISP-bound traffic or whether it should be trunked similarly.

Therefore, absent an enforceable federal right to combined trunking (and, for that matter, absent an enforceable federal right to segregated trunking), this Commission, like the Wireline Competition Bureau, will determine the "more reasonable" approach. While Level 3 has made it a close question, we conclude, as indicated above, that segregated trunking is preferable because it will produce more accurate intercarrier billing and compensation and constrain auditing expenses [fn]. The inefficiencies associated with segregated trunking are not adequately quantified or as conceptually obvious as Level 3 avers.

PAD at 93-94 (footnotes omitted)

Level 3 argues that "the ALJ errs in his determination that segregated trunking is preferable to mixing various types of traffic over a single trunk group." Level 3 BOE at 8. Level 3 argues that the record is insufficient to support this decision and that the decision conflicts with Section 251 of the Act. Level 3 BOE at 9, 18. Level 3's exceptions are without merit.

In support of its contention that the record in insufficient to support the PAD's decision to require the parties to segregate various traffic types on different trunk groups, Level 3 asserts that the PAD ignores evidence that inefficiencies associated with separate trunking for disparate traffic types outweigh billing problems associated with combining disparate traffic types on common interconnection trunk groups. Level 3 BOE at 9. Apart from failing to identify precisely *what* evidence the PAD ignores, Level 3 fails to make a persuasive case to support *its* assertion that costs resulting from inefficiencies associated with separate trunking requirements outweigh the costs associated with billing problems caused by combined trunking.

Level 3 supports its assertion by arguing that SBC has failed to present detailed evidence regarding the precise magnitude and extent of billing problems that arise when disparate traffic types are combined on common interconnection trunks. Level 3 BOE at 10-12. However, Level 3 has likewise provided – as the PAD recognizes - no such detail with respect to costs *it* asserts it will incur if it is required to establish separate interconnection trunk groups for disparate types of traffic. For example, in advocating the use of jurisdictional allocators, Level 3 fails to quantify the effectiveness of these allocators, compared to separate trunk

group arrangements -- the same detail that it criticizes SBC for omitting with respect to SBC's billing concerns. *See, generally*, Level 3 BOE at 12-18 (jurisdictional allocators discussed; no evidence regarding effectiveness in comparison to separate trunk groups adduced).

Furthermore, Level 3's attempts to identify the costs it asserts that it will incur as a result of maintaining separate trunking are even more flawed. Despite the fact that Staff identified potential inconsistencies in the limited information presented by Level 3, Level 3 has failed to explain these inconsistencies. Staff IB at 38-40. In particular, the record is not at all clear regarding whether Level 3 currently exchanges traffic with SBC that is subject to switched access charges, and, if it does exchange such traffic, what the cost of adopting SBC's separate trunk group proposal will be.

Level 3 asserts that, in the event it *did* exchange such traffic directly with SBC, it would purchase Feature Group Trunks, and that it does not currently purchase Feature Group D Trunks. Staff IB at 38; Level 3 BOE at 11. Similarly, Level 3 states that, when it exchanges traffic subject to switched access charges indirectly with SBC, the carriers that it uses to deliver traffic to SBC use access trunks. Tr. at 203-204. This evidence leads to the conclusion that, while Level 3 does not currently exchange interLATA traffic directly with SBC, it might do so indirectly.

Similarly, Level 3 has failed to specifically rebut evidence provided by SBC that Level 3 has not paid any local switching switched access charges for the last

two years – evidence that, again, suggests that Level 3 does not exchange traffic subject to switched access charges directly with SBC at this time. Staff IB at 38.

In contrast to this, however, certain evidence submitted by Level 3 indicates that it does in fact currently exchange traffic subject to switched access charges with SBC. In particular, Level 3 asserts that under SBC's proposal, Level 3 would be compelled to establish Feature Group D Access Trunks to exchange PSTN-IP-PSTN traffic, traffic that it currently exchanges with SBC over common trunk groups, and traffic that is -- according to the evidence submitted by Level 3 -- subject to access charges. Level 3 BOE at 11; Tr. at 146.

By failing to clarify whether or not it currently exchanges traffic that is subject to switched access charges with SBC, Level 3 has created real questions with respect to its position on this issue. That is, if Level 3 is exchanging traffic subject to switched access charges over common trunk groups, it should, as it concedes, be doing so over Feature Group D Trunk Groups, and paying switched access charges. The fact that Level 3 is not doing so suggests that the current practice of combining traffic over common interconnection groups is facilitating access charge avoidance by Level 3 -- a result that contradicts Level 3's position that the Commission's concerns over billing are unsupported. Level 3 BOE at 18.

Alternatively, Level 3 may be exchanging all such traffic indirectly with SBC, using third party routers that deliver this traffic to SBC over Feature Group D Trunks. If this is the case, adoption of SBC's proposal would not generate the need for the "entirely new, duplicative and inefficient network" that Level 3 asserts it would need to deploy. Level 3 BOE at 11. Of course, if Level 3

determined to end its relationship with its third party routing partners, it might need to deploy facilities to replace those it would no longer purchase or lease from its partners. These new deployments of facilities would, however, be the result of Level 3's decision to end reliance on third party routers, rather than on SBC's proposal to require Level 3 to deploy Feature Group D Trunks for the exchange of traffic subject to switched access charges. Presumably, in such a case, Level 3 would need to deploy additional facilities, even if it could lawfully send diverse traffic over common trunk groups.

Finally, if Level 3 does not currently exchange traffic subject to switched access charges directly with SBC, it cannot support its assertions that ordering it to create separate trunk groups for this traffic imposes undue economic costs on it. That is, if it currently does not exchange any traffic subject to switched access charges directly with SBC, then it does not at this time need to provision any separate trunk groups to carry this traffic.

Even if Level 3 does exchange traffic subject to switched access charges directly with SBC, it has provided no evidence regarding the costs of provisioning any separate interconnection trunk groups that might be necessary. For example, there is no evidence that suggests that Level 3 cannot reconfigure its existing trunking facilities and avoid the addition of any facilities beyond those that already exist in its network.

The PAD clearly – and perfectly correctly -- notes that determinations on this issue are hindered by the fact that there is "scant quantitative evidence" regarding the asserted costs and benefits of the countervailing proposals. PAD

at 93. This is a deficiency that was within Level 3's power (and SBC's power) to remedy. Level 3 did not remedy this deficiency and therefore the Commission must, like the ALJ has done in the PAD, make a determination based upon the best information available. Thus, Level 3's assertion that the PAD's recommended findings with respect to these issues are factually unsupportable and legally unsustainable is decidedly unavailing, and Commission should reject it. Level 3 BOE at 11. Level 3's argument amounts to little more that an assertion that, in the event neither party has adduced adequate evidence with respect to an issue, the Commission must decide that issue in favor of Level 3.

Level 3's assertions regarding the legality of the PAD's determinations are similarly unavailing. Level 3 confuses – perhaps intentionally - the precise nature of the services it provides, and the precise nature of its proposal in this proceeding, by discussing the definition of exchange access. Level 3 BOE at 20-21. However, Level 3 witness William Hunt best characterized Level 3's proposal when he stated:

> I think what Level 3 has testified to – and we've been very consistent about – is that it's a One-Plus dial call that originates TDM and we terminate TDM and we would terminate it and pay access charges on that call, just like the FCC order requires.
>
> What we have proposed in this proceeding is that we should be allowed to put that access traffic on the local interconnection trunks, just as we've agreed to with Bell South and we would pay access charges to that traffic, it's just combined the – use the existing trunk groups to terminate that traffic, SBC would be compensated access for that.
>
> Tr. at 166-167

That is, in this proceeding, Level 3 is proposing to place access traffic on local interconnection trunks. As Mr. Hunt has explained, Level 3 wears several telecommunications hats – it is a local exchange carrier, an interexchange carrier, and an Internet provider. Tr. at 141. Level 3 observes that it proposes to place some exchange access traffic over local interconnection trunks. It does not suggest how this fact renders the Commission's decision to require Level 3 to provision separate trunk groups for local and access traffic trunks unlawful.

Furthermore, Level 3 has failed to explain precisely what the nature of its "exchange access" business is. In its *BOE*, Level 3 uses the description "exchange access services (such as the services offered by Level 3)", without explanation of what services it is referring to, and why these services would properly fall under the definition of exchange access services. Level 3 BOE at 20.

Finally, Level 3's arguments that anti-discrimination provisions of subsections 251(c)(2)(C) and 251(c)(2)(D) of the 1996 Act, and the Wireline Competition Bureau's *Virginia Arbitration Order*, each require adoption of its interconnection trunking proposal have been clearly and properly addressed and rejected in the PAD. The PAD's response to Level 3's argument is well reasoned, and Level 3's repetition of its concerns does not alter this fact.

One aspect of Level 3's argument merits a certain amount of discussion, however. Specifically, the PAD states that:

> Additionally, Level 3 avers that the FCC, through its Wireline Competition Bureau, rejected segregated trunking on grounds of inefficiency and disproportionality in the Virginia Arbitration Order. We find that claim misleading.

PAD at 91.

Level 3 takes significant umbrage at this characterization, purporting to find the PAD's alleged "refusal to follow the unambiguous lead of the FCC … **astounding**[.]" Level 3 BOE at 23 (emphasis added). It alleges that the failure to follow this "clear guidance …[from the FCC] cannot be sustained." Id. at 24.

In fact, the PAD finds Level 3's position to be "misleading" precisely because it is. The PAD correctly recognizes that the Wireline Competition Bureau's findings related to busy line verifications and emergency interrupt calls, obscure varieties of traffic that, the parties agreed, would occur in, at most, minimal volumes. PAD at 93; *see also Memorandum Opinion and Order*, ¶¶182-185, In the Matter of Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Virginia State Corporation Commission Regarding Interconnection Disputes with Verizon Virginia Inc., and for Expedited Arbitration, DA 02-1731, CC Docket Nos. 00-218, 00-249, and 00-251 (rel. July 15, 2002) (hereafter "Virginia Arbitration Order"). The Wireline Bureau found that, in light of the small traffic volumes involved with busy line verifications and emergency interrupt calls, CLECs should not be required to set up separate trunk groups exclusively for those types of traffic. Id.

Level 3 attempts to extend this rather mundane finding well beyond any interpretation that it might reasonably bear. What Level 3 proposes, as the PAD correctly notes, is to take the Wireline Bureau's rejection of "separate trunking for busy line verification and emergency interrupt calls[,]" and apply it to "the far greater traffic volume associated with local and interexchange services in

general[.]" PAD at 93. This is clearly an inapposite result; no party to the *Virginia Arbitration Proceeding* appears to have questioned the requirement that CLECs use Feature Group D trunks, but instead contested the issue of what features such trunks could be used to provision. Virginia Arbitration Order, ¶¶532-39. Likewise, the parties to the *Virginia Arbitration Proceeding* appear to have generally accepted the fact that multiple trunks would often be necessary, and disputes regarding interconnection trunks therefore related to capacity and configuration of such trunks; Id., ¶¶222 *et seq*., ¶¶226 *et seq*., ¶¶233 *et seq*., ¶¶263 *et seq*.

The Wireline Bureau's findings regarding separate trunking are simply not significant in the context of this arbitration. In other words, the only thing remotely "astounding" here is Level 3's willingness to extrapolate an "unambiguous lead of the FCC" and "the FCC's clear guidance" out of a very minor, and inapposite, finding by the Wireline Bureau.

C. Level 3 Exception 7 - Issue PC/VC 1

With respect to Issues PC/VC 1, the PAD finds that:

> The Commission concludes that Level 3 should interconnect with SBC and obtain SBC products and services pursuant to the parties' ICA, not through SBC tariffs. That said, we agree with Staff's recommendation - which SBC purports to adopt - that Level 3 be authorized to obtain services from a tariff when those services are *not* provided through the parties' ICA. Staff Ex. 2.0 at 21. This will permit Level 3 to obtain products, services and terms that were either not addressed or unavailable when the ICA was formed. Additionally, Level 3 should be able to procure products, services and other arrangements from SBC tariffs that, by their terms, are available to a carrier in an ICA with SBC. We also note that when SBC makes new or revised product or service terms (including collocation arrangements) available to CLECs through its

> Accessible Letters, it "offers each CLEC an opportunity to amend its existing [ICA] in light of changes in law or new, generally available offerings." SBC Init. Br. at 205. We recognize, and intend, that the foregoing options will not afford Level 3 unlimited access to terms and services beyond the ICA. We share the FCC's concern that the give-and-take associated with negotiation will be subverted if carriers can improve upon their compromises, without surrendering their gains, by simply abandoning the former as subsequent opportunities arise.
>
> PAD at 215 (footnote omitted).

Level 3 takes exception to the PAD's recommended resolution of these issues. Level 3 BOE at 44. Specifically, Level 3 states that the PAD's finding that Level 3 should only be permitted to purchase from SBC's tariffs if the services Level 3 wishes to purchase are not provided for in the tariff, "puts Level 3 at a disadvantage verses [sic] every other CLEC who [sic] has the ability to purchase out of tariff[,]" since Level 3 contends that "if Level 3's Agreement contains terms related to a particular form of collocation, and then SBC voluntarily amends, or the Commission orders SBC to amend, such terms in its tariffs, Level 3 would be unable to benefit from the amendments." Id. Level 3 asserts that this outcome is discriminatory, in violation subsections 251(c)(2)(C) and (D) of the federal Act. Id.; *see also* 47 U.S.C. §251(c)(2)(C),(D).

Level 3 further contends that the PAD's decision in this regard is logically infirm, inasmuch as:

> If, as the DAP [sic] concludes, Level 3 cannot purchase collocation services out of the tariff because it has an Agreement with SBC that includes terms related to that particular service, then there is no use for the tariff. The PAD's determination on this issue obviates the need to any [sic] collocation tariffs. Additionally, if the use for the tariff is to provide other CLECs that do not have such an interconnection agreement with access to the collocation services, then the obvious result is that the Commission has entered an order

> that treats Level 3 in a discriminatory manner verses these other carriers in violation of the Act.
>
> Level 3 BOE at 44-45.

Level 3's argument should be rejected. The PAD's resolution of this issue is perfectly correct; the federal Act establishes a scheme of individual negotiations between carriers regarding rates, terms and conditions of interconnection, rather than tariffs. *See, e.g.*, Wisconsin Bell v. Bie, 340 F.3d 441 (7th Cir. 2003). To the extent that Level 3 and SBC have, through negotiation, agreed upon mutually acceptable rates, terms and conditions of interconnection and provisioning of services, these should be – and, indeed, are – binding upon both parties. Level 3, however, seeks the unilateral right to choose more favorable rates, terms and conditions, in the event that SBC from time to time provides in its tariffs for such terms and conditions, either voluntarily or as a result of being ordered to do so.[2] If Level 3 and SBC were to agree to give Level 3 this right under contract in a negotiated agreement context, the Commission would approve this. In an arbitrated context, however, Level 3 needs to show that it is entitled to this unilateral right under law.

Level 3 appears to argue that, if it cannot immediately obtain the most favorable terms and conditions available to any CLEC in Illinois, it is being discriminated against in violation of subsection 251(c)(2)(D). This argument is spurious. In this context, the PAD's reference to the FCC's *Pick and Choose Order* is apposite. PAD at 215; *see also Second Report and Order*, In the Matter

[2] Staff suspects that Level 3 would be very disinclined to accept the logical corollary to its position, which is that SBC could impose less favorable terms and conditions upon Level 3, to the extent that a tariff change contains such terms.

of Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, FCC No. 04-164, CC Docket No. 01-338, 19 FCC Rcd. 13, 494 (Rel. July 14, 2004)("Pick and Choose Order"). In the *Pick and Choose Order*, the FCC adopted rules that require an "all or nothing" approach to the opt-in process provided for by Section 251(g) of the federal Act. Pick and Choose Order, ¶11. In other words, if a CLEC elects to opt into an agreement that an ILEC has with another CLEC – a practice specifically provided for under Section 251(g) – it must opt into the entire agreement, rather that just those terms and conditions it happens to prefer, as was previously permitted. Id., ¶¶11-17.

Level 3 argues that reliance upon the *Pick and Choose Order* is improper in this context, but this argument ignores the *Pick and Choose Order's* conclusion that a "pick and choose" approach to opting into agreements was not required to prevent discrimination. Pick and Choose Order, ¶19. This is, of course, fatal to Level 3's argument that it is discriminated against to the extent that it cannot get the most favorable rates, terms and conditions available for *every* interconnection service and UNE.

Likewise, Level 3 can scarcely claim that it will be placed at a competitive disadvantage *vis-à-vis* other carriers. First, if the Commission orders SBC to amend a tariff, this might well constitute a change of law pursuant to which Level 3 would be within its rights to seek negotiations under the ICA's change of law provisions, as the PAD recognizes. PAD at 215-16. Second, Level 3's notion that "the use for [a] tariff is to provide other CLECs that do not have such an interconnection agreement with access to the collocation services[,]" Level 3

BOE at 44, seems to the Staff to be a questionable proposition, since Staff is informed and believes that CLECs without ICAs rarely if ever interconnect in Illinois; Staff is certainly unaware of any such CLEC.

D. Level 3 Exception 8 - Issue PC/VC 2

With respect to Issue PC/VC 2, the PAD recommends the following resolution:

> The Commission believes that this collocation issue presents distinguishable questions of necessity and safety. Safety concerns are more exigent, and involve higher stakes, than disputes about necessity. We will therefore divide this issue into those two categories for analysis and resolution. Additionally, we are mindful of SBC's admonition that this issue addresses the parties' conduct pending dispute resolution, not the substantive standards pertaining to necessity and safety.
>
> With respect to necessity, the Commission concludes that Level 3 may proceed with new collocation, or continue with existing collocation, while dispute resolution is conducted. The FCC has assigned to ILECs the responsibility of formally proving to this Commission the validity of any claim that collocation equipment is unnecessary [fn]. We draw several inferences from this. First, the FCC wants to protect alternative carriers, in every pertinent instance, from arbitrary and anti-competitive action by the subject ILEC. Second, absent a persuasive showing by the ILEC, the relevant collocation equipment must be considered necessary. Third, it would not serve the beneficiary of this regime (the alternative carrier) to be delayed pending the resolution of the formal process required by the FCC for the alternative carrier's protection. That said, this Commission does not want to encourage a "nothing to lose" approach by the CLEC, by which even blatantly unnecessary equipment might be installed with impunity, Consequently, all costs associated with removal of equipment this Commission ultimately finds unnecessary must fall upon Level 3.
>
> Regarding safety, we adopt the opposite resolution. In the face of an SBC objection grounded in safety, new collocation cannot proceed, and collocation already in place must be rendered safe, pending resolution of any formal dispute presented to us. We

> find it significant that in matters of safety, as contrasted to necessity, the FCC does not require the ILEC to prove its case to this Commission. Instead, the ILEC is obliged only to precisely identify, by affidavit, its safety concern for the CLEC [fn]. The CLEC can then either accept the ILEC's sworn claim or initiate dispute resolution or complaint procedures. Thus, the FCC has shifted the burdens of action and persuasion to the CLEC when safety is at issue. In our judgment, it therefore follows that the CLEC cannot continue with the collocation of the pertinent equipment without first alleviating the problem or proving its case.
>
> The Commission does not believe, however, that for collocation *already in place* to be rendered safe, equipment must necessarily be removed from the collocation site during dispute resolution. In addition to identifying the safety requirement that Level 3 purportedly fails to meet (and the manner of that failure), the ILEC must also declare its "basis for concluding why collocation of equipment not meeting this safety requirement would compromise network safety."[306] If that basis can be remedied without removal of equipment (e.g., by disabling it), Level 3 should have the option to do so during the ten day compliance window contemplated by SBC, but with no option to reactivate the equipment pending any dispute resolution.
>
> The Commission also adopts Staff's two recommendations for clarifying the parties' rights and responsibilities. First, SBC should provide Level 3 with a list of qualifying equipment upon receipt of a collocation request. Level 3 objects that SBC has committed only to furnishing a list of equipment already collocated with SBC. We cannot, however, require SBC to anticipate any and all equipment that might be collocated, although we suggest that SBC's list include existing or new equipment that SBC believes to be safe, even if such equipment has yet to be collocated at the relevant SBC facility. Second, we agree with Staff that the list should be supplied immediately.
>
> PAD at 219-221

Level 3 contends that the PAD errs because, Level 3 alleges, it allows SBC to refuse to permit Level 3 to collocate equipment on the grounds of safety. Level 3 BOE at 45-46. Level 3 argues that the PAD ignores the provisions of 47 C.F.R. 51.323(c) regarding an ILEC's right to raise safety concerns. Id. at 46. It

claims that: "[n]o where [sic] in the [sic] Part 51.323(c) does the FCC grant the ILEC the unilateral authority to **preemptively** deny collocation as the PAD would authorize SBC to do." Id. (emphasis in original). Further, Level 3 avers that the ILEC, in this instance, SBC bears the burden of proof that CLEC equipment is not necessary. Id.

To understand the infirmities in Level 3's argument – and to appreciate the merits of the PAD's findings – it is necessary to review 47 C.F.R. §51.323(c) in some detail.

47 C.F.R. §51.323(c) provides that:

> Whenever an incumbent LEC objects to collocation of equipment by a requesting telecommunications carrier for purposes within the scope of section 251(c)(6) of the Act, the incumbent LEC shall prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements under the standards set forth in paragraph (b) of this section. An incumbent LEC may not object to the collocation of equipment on the grounds that the equipment does not comply with safety or engineering standards that are more stringent than the safety or engineering standards that the incumbent LEC applies to its own equipment. An incumbent LEC may not object to the collocation of equipment on the ground that the equipment fails to comply with Network Equipment and Building Specifications performance standards or any other performance standards. An incumbent LEC that denies collocation of a competitor's equipment, citing safety standards, must provide to the competitive LEC within five business days of the denial a list of all equipment that the incumbent LEC locates at the premises in question, together with an affidavit attesting that all of that equipment meets or exceeds the safety standard that the incumbent LEC contends the competitor's equipment fails to meet. This affidavit must set forth in detail: the exact safety requirement that the requesting carrier's equipment does not satisfy; the incumbent LEC's basis for concluding that the requesting carrier's equipment does not meet this safety requirement; and the incumbent LEC's basis for concluding why collocation of equipment not meeting this safety requirement would compromise network safety.

47 C.F.R. §51.323(c)

It is clear from the forgoing that the PAD is correct in finding that an ILEC's right to deny collocation based on safety is entirely different from an ILEC's right to deny collocation based on necessity. In the latter case, necessity, the ILEC must "prove to the state commission that the equipment is not necessary for interconnection or access to unbundled network elements under the standards set forth in paragraph (b) of … [S]ection [51.323]." 47 C.F.R. §51.323(c). In the former case, safety, the ILEC need only (a) refrain from applying standards more stringent than it applies to its own equipment; and (b) provide the requesting CLEC, within 5 days, a list of equipment the ILEC itself collocates, along with an affidavit that the ILEC's equipment meets the safety standards that the CLEC's equipment fails to meet, along with considerable detail regarding the safety standard in question, the manner in which the CLEC's equipment violates it, and the ILEC's basis for concluding that this violation would compromise network safety. Id. In other words, an ILEC can, for good cause shown in detail, preemptively deny collocation on grounds of safety.

Accordingly, Level 3's argument should be rejected. Level 3's attempt to conflate and confuse the standards for necessity and safety, *see* Level 3 BOE at 46, is unavailing; as noted above, and as the PAD recognizes, the text of the applicable rule clearly shows that the two standards are quite different.

In addition, Level 3 argues that the PAD "gives SBC the unilateral authority to prevent" collocation of its equipment particularly if Level 3 "does not meet the nebulous minimum safety standards." Level 3 BOE at 46. This

argument is likewise futile; the safety standards are, as noted above, in no way nebulous, especially since the PAD specifically requires SBC to, consistent with Staff's recommendations, "provide Level 3 with a list of qualifying equipment upon receipt of a collocation request." PAD at 221. In any case, Section 51.323(c) requires an ILEC denying collocation of equipment based on safety concerns to disclose its safety requirements and safety concerns with a great deal of specificity.

Level 3 relies upon a recent finding by the Indiana Utilities Regulatory Commission in support of its position. Level 3 BOE at 46-47. Here again, however, Level 3 fails to grasp, or purposely ignores, the difference between safety and necessity that the PAD correctly recognizes. It is clear that the IURC was, in the passages cited by Level 3, dealing exclusively with the question of SBC's right to deny collocation on the grounds that equipment is not necessary to provide service. *See* Level 3 BOE at 47. The word "safety" appears nowhere in the passages in question. Id. Level 3's attempt to confuse the two standards should be rejected, along with its remaining arguments regarding this issue.

III. Conclusion

WHEREFORE, for all the foregoing reasons, Staff respectfully requests that the ALJ consider Staff's replies to exceptions, recommendations and clarifications and modify the Proposed Arbitration Decision accordingly.

Respectfully submitted,

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